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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LEROY DARON, JR., Defendant and Appellant.	B207917 (Los Angeles County Super. Ct. No. YA 066966)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Affirmed in part; reversed in part with directions.

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Julie Sullwold-Hernandez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

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Charles Leroy Daron, Jr., appeals from the judgment following his convictions by a jury of first degree burglary and evading a police officer. The court sentenced Daron under the Three Strikes law to consecutive terms of 25 years to life on each conviction[1] and an additional 5-year term under Penal Code section 667, subdivision (a)(1), for a total term of 55 years to life. We affirm Daron's convictions but vacate his sentence and remand the cause to the trial court for a redetermination whether the Three Strike sentences should run consecutively or concurrently.

FACTS AND PROCEEDINGS BELOW

At approximately 1:30 p.m. Officer Erick Gaunt was in his marked patrol car driving east on Palos Verdes Drive in the city of Palos Verdes Estates. He saw a green Chevrolet Suburban traveling west at approximately 50 m.p.h. in the 35 m.p.h. zone. Officer Gaunt made a U-turn and began following the Suburban to determine its actual speed. As he did so, the Suburban increased its speed to between 50 and 60 m.p.h. Officer Gaunt put on his overhead lights and siren in an attempt to make a traffic stop. Instead of stopping, the Suburban drove even faster, at times up to 90 m.p.h., failed to stop at stop signs, weaved in and out of traffic, drove on the wrong side of the road and eventually flipped three times and came to rest on its roof. Defendant Daron crawled out of the upside-down car and began running. Officer Gaunt ran after him, caught him and placed him under arrest.

In searching the Suburban, police found a pillowcase containing numerous items of jewelry and personal articles that had been stolen from a home in Rolling Hills Estates between 12:00 p.m. and 1:30 p.m. that day.

At the time of his arrest, Daron had a pair of white athletic socks rolled up in the left front pocket of his pants and no socks on his feet. In his right pocket, he had $136 in small bills including a $2 bill.

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1 The court sentenced Daron for evasion of a police officer as a felony under Vehicle Code section 2800.2, subdivision (a).

A jury found Daron guilty of first degree burglary and evading an officer. Daron waived his right to a jury trial on the People's allegations of prior convictions and the court found that he had suffered 19 prior convictions for violent felonies (robberies) and a prior serious felony conviction for purposes of the 5-year enhancement under Penal Code section 667, subdivision (a).[2] The court also found that the burglary and the evasion of the police officer did not arise out of the same operative facts. The court sentenced Daron under the Three Strikes law to consecutive sentences of 25 years to life plus 5 years for the prior conviction under section 667, subdivision (a). Daron filed a timely appeal.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE THAT DARON COMMITTED THE BURGLARY

First degree burglary requires proof that the defendant entered an inhabited dwelling house with the intent to commit grand or petit larceny or any felony. (§§ 459, 460, subd. (a).) The trial court instructed the jury on these elements. It also instructed the jury under CALCRIM No. 376 which states in relevant part:

"If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of burglary based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed burglary.

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of burglary."

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[2] All further statutory references are to the Penal Code.

Daron does not challenge the sufficiency of the evidence to prove that he knew he possessed stolen property and that the property had been recently stolen. Rather, he maintains that there was not even "slight" evidence to support his burglary conviction. We disagree.

Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we conclude that sufficient evidence supported Daron's burglary conviction.[3] Daron was not wearing socks when he was arrested but the police found a pair of socks in a pocket of his pants. Officer Gaunt testified that in his experience "perpetrators use socks to avoid leaving any kind of fingerprints during the commission of a crime." The police also found over $100 in small bills, including a seldom seen $2 bill, in another pocket of Daron's pants. The burglary victim testified that a wad of small bills including a $2 bill had been stolen from the bedroom closets. The jury could reasonably conclude that the socks had been used in the burglary to avoid detection and that if Daron had merely been the recipient of stolen property, cash in small denominations would not have been included in the property received by him.

Daron cites cases in which the evidence supporting the defendant's conviction for burglary directly connected the defendant to the scene of the crime (see, e.g. *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173-1174) and argues that the supporting evidence *always* must do so. He cites no authority for that proposition and we reject it. In the present case, for example, the circumstantial evidence supports Daron's burglary conviction even though no direct evidence placed him at the scene of the crime.

II. THE FLIGHT INSTRUCTION, CALCRIM NO. 372

Daron argues that the court erred in instructing the jury under CALCRIM No. 372 which states in relevant part: "If the defendant fled immediately after the crime was

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3 This conclusion answers Daron's contention there was insufficient evidence to support giving the "slight supporting evidence" instruction, CALCRIM No. 376.

committed, that conduct may show that he was aware of his guilt." Daron objects to the phrase "aware of his guilt," contending that it improperly suggests to the jury that proof of flight is proof of guilt because a person could not be "aware of his guilt" unless he was in fact guilty.[4]

We reject this argument because it misconstrues the language of the instruction. The instruction does not say that a person who immediately flees the scene of a crime *is* "aware of his guilt." It says that by immediately fleeing the scene of a crime the defendant "*may* show that he was aware of his guilt" (italics added) and that it is up to the jury "to decide the meaning and importance of that conduct." Daron also ignores the concluding sentence of the instruction which states: "However, evidence that the defendant fled cannot prove guilt by itself."

III. CONSECUTIVE SENTENCES UNDER THE THREE STRIKES LAW

Because Daron had more than two prior violent felony convictions, the court sentenced him under the Three Strikes law (§ 667, subds. (b)-(i)) to 25 years to life on the burglary and evading convictions. The court ordered the sentences to run consecutively under section 667, subdivision (c)(6) which states in relevant part: "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ."

As the court pointed out in *People v. Hall* (1998) 67 Cal.App.4th 128, 138-139, the Three Strikes law "requires consecutive sentencing *only* if the current crimes arose on different occasions *and* out of different sets of operative facts." (Italics added.) If the current crimes arose on the same occasion or arose from the same operative facts, the court has discretion to impose consecutive sentences. (*Ibid*.)

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4 Daron does not contend that the flight instruction was unsupported by the evidence. Accordingly, we do not consider the issue.

Here, the trial court stated it found the crimes of burglary and evasion of a police officer "did not rise out of the same operative facts, and pursuant to . . . section 667 (c)(6) . . . the court imposes consecutive sentences of 25 years to life." Although the court did not make an explicit finding that the two offenses did not occur on the same occasion, that finding is implicit in the court's citation of the mandatory consecutive sentencing provision of section 667, subdivision (c)(6), as its authority for imposing consecutive sentences.

We conclude that the trial court erred in imposing mandatory consecutive sentences under section 667, subdivision (c)(6). Although we agree that sufficient evidence supports the court's finding that the crimes of burglary and evading an officer did not arise out of the same operative facts, insufficient evidence supports the court's implied finding that the offenses were not committed on the same occasion. Our Supreme Court has held that the latter determination depends on the "temporal and spatial proximity" of the crimes. (*People v. Lawrence* (2000) 24 Cal.4th 219, 233.) In the case before us, the evidence shows only that the victim left her home at approximately 12:00 p.m. and that Officer Gaunt saw Daron speeding on Palos Verdes Drive at approximately 1:30 p.m. The record does not reveal whether Daron committed the burglary as long as an hour and a half before he attempted to evade Officer Gaunt or just a few minutes before doing so. Furthermore, the record contains no evidence of the distance between the victim's home and the spot where Officer Gaunt first observed Daron speeding. (Cf. *People v. Hall*, *supra*, 67 Cal.App.4th at p. 140 [mandatory consecutive sentences reversed in part because evidence insufficient regarding when the two crimes were committed].)

We will remand the case to the trial court to conduct a new sentencing hearing and exercise its discretion whether to impose concurrent or consecutive sentences.

DISPOSITION

The judgment is reversed with respect to imposition of consecutive sentences under the Three Strikes law and the cause is remanded for a new sentencing hearing in which the court is to exercise its discretion to impose consecutive or concurrent sentences. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.